

United Parcel Service and Local 243, International Brotherhood of Teamsters, AFL-CIO. Case 7-CA-37666

April 30, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On December 2, 1996, Administrative Law Judge Judith A. Dowd issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order as modified.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, United Parcel Service, Livonia, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(d).

"(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

2. Substitute the attached notice for that of the administrative law judge.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² Chairman Gould would overrule *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976), and find that the unilateral implementation of timeclocks in that case to be a unilateral change in employees' terms and conditions of employment in violation of Sec. 8(a)(5).

³ We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

We have substituted a new notice to include the name of the Union.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT change the on-call procedure for ALO drivers without affording the Union an opportunity to bargain with respect to this conduct.

WE WILL NOT fail and refuse to bargain with Local 243, International Brotherhood of Teamsters, AFL-CIO in good faith.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL immediately reinstitute the on-call procedure for ALO drivers that was in effect on March 1, 1995.

WE WILL, on request by the Union, bargain in good faith over the on-call procedure.

WE WILL make whole any ALO drivers for any wages and/or benefits lost as a result of the unlawful change in the on-call procedure effective March 6, 1995.

UNITED PARCEL SERVICE

Richard F. Czubaj, Esq., for the General Counsel.

John P. Hancock Jr., Esq., of Detroit, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

JUDITH ANN DOWD, Administrative Law Judge. This case was heard in Detroit, Michigan, on September 17, 1996. The charge was filed on September 12, 1995, by Local 243, International Brotherhood of Teamsters, AFL-CIO (the Union). On December 13, 1995, the Regional Director for Region 7 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing (complaint). The complaint alleges that United Parcel Service (the Respondent or UPS) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by changing the call-in procedure for on-call feeder drivers at the Livonia facility, without affording the Union prior notice or an opportunity to bargain. The Respondent filed an answer and on September 12, 1996, an amended answer, denying the commission of any unfair labor practice and raising certain affirmative defenses.

At the hearing, the parties were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

United Parcel Service, a corporation, with an office and place of business at 29855 Schoolcraft, Livonia, Michigan, is engaged in the pickup and delivery of packages for companies and individuals. During calendar year 1994, Respondent received revenues in excess of \$500,000 from serving as a link in the transport of goods in interstate commerce, the goods originating in the State of Michigan and being transported from Respondent's Michigan facilities directly to points outside the State of Michigan.

In its answer, the Respondent admitted the above-stated facts concerning its business operations, but it alleged that it is a regulated air carrier and, as such, the Board lacks jurisdiction over it. Prior to the taking of testimony at the hearing, the General Counsel argued that the Board has jurisdiction over the Respondent citing, *inter alia*, *United Parcel Service v. NLRB*, 92 F.3d 1221 (D.C. Cir. 1996). The latter case affirmed the Board's decision in *United Parcel Service*, 318 NLRB 778 (1995), holding that the exercise of jurisdiction was proper because UPS is an employer as that term is defined in the Act. See also *United Parcel Service of Ohio*, 321 NLRB 300 (1996). Counsel for the Respondent stated that it was not waiving the jurisdictional issue by proceeding with the hearing. The Respondent presented no evidence at the hearing on the jurisdictional issue. Based on the foregoing, I find that the Board has jurisdiction over the Respondent in this case.

The complaint alleges, the answer admits, and I find that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. Background

The feeder department of Respondent's Livonia facility includes a group of employees known as ALO drivers.¹ ALOs are on-call drivers who lack sufficient seniority to claim scheduled jobs and whose names are placed on a list by seniority order every Friday. On that day the ALO drivers are able to ascertain their position on the on-call list and to estimate when they are likely to be called for a job assignment. Unscheduled jobs are called into the Respondent's dispatchers who, with about an hour's notice, call ALO drivers in seniority order to report for work.

B. The On-Call Procedure in Place on March 1, 1995

For a number of years prior to March 1995, and at least since 1990, the Respondent's practice had been to call the first driver on the seniority list and if that driver did not answer the phone the next most senior driver on the list would be called, until the job was assigned. When another job came in, the first driver on the seniority list would be called again and the process was repeated. Sometime in about 1994, a problem developed because certain of the most senior drivers were not answering early morning calls from the dispatcher,

particularly on Mondays. Consequently, less senior drivers who were not expecting to be called at that time to report for duty were being contacted. Some of these less senior drivers were unable to work, because they lacked sufficient rest, or had taken an alcoholic drink, or otherwise failed to meet Department of Transportation requirements. These drivers were subject to discipline by the Respondent for being unprepared to report for duty when called.

Sometime in 1994, the Respondent posted a notice stating that drivers at the top of the seniority list who failed to answer their phones would be dropped to the bottom of the seniority list for the day. Union Representative Gregory Lowran called the Respondent's labor department and reached an agreement that the notice would be pulled down and no such change in the on-call procedure would be made. In 1994 and 1995, representatives of the Union met sporadically with UPS managers concerning this problem. However, no mutually agreeable resolution of the problem could be reached.²

C. The Change in the On-Call Procedure

On March 1, 1995, a UPS feeder department manager, Brian Behan, posted a notice on a bulletin board near the dispatch window which is maintained by the Respondent for the purpose of posting work-related information. The notice reads as follows:

March 1, 1995

To: All Feeder Drivers
From: Brian, Hank, John, Rich³
Re: Change in call-in procedure

Starting Monday, March 6, 1995, the on call procedure will be changed. Any person not available for work when called will be skipped and moved to the bottom of the list for that day.

This change has been made necessary due to the fact that those people at the top of the list have not met their obligation to be available on Monday mornings between the hours of midnight and 6:30 a.m.

After the above memorandum was posted, Joe Burger, one of the ALO drivers, called employee Anthony Maini, a union steward who was on vacation at the time, and reported that someone had posted a change in the call-in procedure. When Maini returned to work on March 6, he spoke to Feeder Department Manager John Shanks. Maini inquired whether the memorandum had been posted pursuant to an agreement between UPS and the Union. When Shanks admitted that there was no agreement, Maini told him that this change could not be made without consultation with the Union. Shanks then removed the announcement from the bulletin board. Maini, who believed that the Respondent no longer intended to make changes in the on-call procedure, did not report the notice posting to the Union's full-time representative, Gregory

¹ Respondent's labor relations manager, Ira Ozeran, testified that ALO means "absent and laid off," but for some unexplained reason those initials are used to refer to on-call drivers who are neither absent nor laid off.

² Representatives of the Union and the Respondent did reach a written agreement concerning special call-in procedures for ALO drivers during the Christmas holiday period for 1994.

³ These are the first names of Feeder Department Managers Brian Behan, Hank Johnson, John Shanks, and Rich Leonard.

Lowran.⁴ Beginning on March 6, the Respondent implemented the procedure outlined in the March 1 notice.

D. The Union's Representative is Informed About the Change in the On-Call Procedure

On or about July 28, 1995, Union Representative Gregory Lowran attended a meeting with UPS Managers Ira Ozeran, Ron Vail, John Shanks, and Brian Behan, to discuss the on-call procedure and to consider some pending grievances. During the course of the meeting, the participants began to discuss the grievance filed by ALO driver David McFarlane, alleging that he had improperly been dropped to the bottom of the seniority list and had thereby lost a day's work to a less senior driver. Respondent's managers informed Lowran that the on-call procedure had been changed in March and they gave him a copy of the March 1 memorandum. Lowran protested that the Respondent could not change the on-call procedure unilaterally. UPS representatives told Lowran that they were changing it anyway.

On August 1, 1995, Lowran filed a grievance alleging that the Respondent made a unilateral change in the ALO on-call procedure without bargaining with the Union. This grievance was subsequently dismissed at the third level, by the joint area committee, as untimely under the grievance filing and processing provisions of the collective-bargaining agreement.

From March 6 to the present, the Respondent has uniformly maintained a call-in system under which senior drivers who fail to answer the phone are automatically dropped to the bottom of the seniority list for the day. Several employees have filed grievances alleging that they have lost work to junior drivers as a result of the change in the on-call procedure. The combined grievances allege a loss of 10 to 12 days of work for senior drivers.

III. DISCUSSION AND CONCLUSIONS

Section 8(d) of the Act provides, in pertinent part, that

to bargain collectively is the performance of the mutual obligation of the employer and the representatives of employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.

An employer violates its duty to bargain with the exclusive bargaining representative of its employees by unilaterally implementing changes in terms and conditions of their employment which constitute mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962).

The Respondent has never claimed that the March 1995 change in the on-call procedure, which impacted drivers' hours and could impact their wages, was not a mandatory subject of bargaining. I find that the on-call procedure was

a mandatory bargaining subject and that the Respondent was therefore required to give the Union adequate prior notice and an opportunity to bargain before changing it.⁵ See *Sheraton Hotel Waterbury*, 312 NLRB 304 (1993), modified on other grounds 31 F.3d 79 (2d Cir. 1994); and *Akron General Medical Center*, 232 NLRB 920 (1977). (A change in employees' working hours is a mandatory bargaining subject.)

The Respondent admittedly posted the March 1 memorandum announcing the change in the on-call procedure without first speaking to any representative of the Union or sending a copy of the announcement to the Union. On March 6, the date on which the change in procedure was implemented, employee Anthony Maini, a union steward who had learned about the posting from one of the drivers, protested to UPS Manager John Shanks that no such change could be made without consultation with the Union. The credited evidence shows that in response to Maini's protest Shanks removed the announcement from the bulletin board. Shanks' removal of the memorandum in response to a union protest, and after it had been posted for only 5 days, rendered the posting ambiguous at best.⁶ In order to be effective, notice of a change by an employer must be clear and unambiguous. *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993); and *Fountain Valley Regional Hospital*, 297 NLRB 549, 551 (1990).

Even if I were to credit Shanks' testimony that he did not remove the memorandum from the bulletin board, Maini's knowledge of the change, acquired on the day it was implemented, was insufficient to afford the Union an opportunity to bargain in advance of the change. An employer is required to give a union notice of its intention to make a change sufficiently in advance to allow meaningful bargaining to occur before the change is implemented. If the notice is too short, it amounts to nothing more than informing the union of a fait accompli. *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), and cases cited.⁷

The Respondent did not give the Union notice of the change in procedure until July 28, when UPS managers gave a copy of the March 1 memorandum to the Union's representative. The change in procedure had been in effect at that time for over 4 months. Notice of a change provided months after it took effect is clearly insufficient. *Id.* Accordingly, I find that the Respondent's unilateral change in the on-call procedure without providing the Union adequate notice and an opportunity to bargain violated Section 8(a)(1) and (5) of the Act.

Respondent contends in its brief that this case should be dismissed because the charge, which was filed on September 12, 1995, exceeded the 6-month statute of limitations set out

⁵ The Respondent contends that the alleged change in the on-call procedure was not actually a change but a return to an earlier procedure that had been used some time in the past. Assuming, arguendo, that the procedure announced and implemented in March 1995 had been used some time in the past, it nevertheless constituted a material, substantial, and significant change in the system that had been in place for at least the 5 years immediately prior to March 1995.

⁶ The evidence shows that announcements concerning work rules are normally posted for a period of several weeks before they are removed.

⁷ Because I have found on the facts in this case that Maini was not afforded proper notice of the change, I find it unnecessary to rule on the issue of whether an employer can satisfy its obligation to give notice of a proposed change to a union by informing a shop steward.

⁴ In his testimony, Shanks acknowledged that Maini talked to him on March 6 and requested that he take down the notice, but Shanks denied that he agreed to do so. According to Shanks, he rejected Maini's protests about the announced change and told him "that is the way it is going to be." I find Maini's version of the conversation more credible than Shanks' testimony. Maini's demeanor was calm and confident, and he appeared to be a credible witness. In any event, under either version, the memorandum did not constitute adequate notice to the Union of the change in the on-call procedure. See, *infra*.

in Section 10(b) of the Act.⁸ In this regard, the Respondent maintains that the statute of limitations began to run on either March 1, when the announcement of the change was posted, or March 6, when it was implemented. The statute of limitations begins to run on an unfair labor practice when the aggrieved party has notice of its commission. *Postal Service Marina Center*, 271 NLRB 397 (1984). The evidence in this case shows that the Union did not acquire actual notice of the change in procedure on March 1 or 6. Moreover, as found above, UPS failed to give the Union notice of the change in procedure until July 28. I find that the latter date marks the commencement of the statutory 10(b) period. Since the statute of limitations did not begin to run until July 28, the unfair labor practice charge filed on September 12, was not untimely.⁹

The Respondent further contends that a letter of understanding appended to the parties' August 1, 1993, to July 31, 1997, collective-bargaining agreement effectively eliminated the past practice of recalling the most senior driver if no response was received to a first call. The letter of understanding provides, in pertinent part, as follows:

It is mutually agreed between United Parcel Service and Teamsters Local 243 that the parties have attempted to reduce to writing all past practices known to the parties.

Therefore effective August 1, 1993 any other practice which does arise, shall either be mutually agreed to and reduced to writing, or where mutual agreement cannot be reached the applicable provisions of the 1993-1997 National Master United Parcel Service Agreement and Central Conference of Teamsters, United Parcel Service Supplemental Agreement would apply.

Union witnesses testified at the hearing that this letter of understanding was not intended by the parties to eliminate any ongoing practice, such as the call-in procedure. The Union's position is supported by the fact that UPS continued to recall senior drivers who failed to answer a first call after the letter

of understanding was signed in 1993. Furthermore, the Respondent admittedly withdrew its 1994 attempt to change the on-call procedure after the Union lodged a protest. These actions by the Respondent undercut its position that the letter of understanding effectively eliminated the practice of recalling the most senior driver.

The Respondent's contention that the Union waived its right to bargain by failing to insist on bargaining over the change in the on-call procedure is without merit. The Union did not learn about the change in the on-call procedure until it had been in effect for over 4 months. A union is not obligated to request bargaining over a matter that is already a fait accompli. See *RCA Corp.*, 296 NLRB 1175, 1179 (1989), and cases cited; *Intersystems Design Corp.*, 278 NLRB 759 (1986). The Respondent's suggestion that the Union somehow waived its right to bargain because the employees themselves knew about the change and acquiesced in it is without merit. First, there is no authority for the proposition that employee acquiescence in an unlawful change can effect a waiver of a union's bargaining rights. Second, the lack of employee grievance filing between March 6 and July 24 does not establish that the drivers knew about the change and acquiesced in it. Only the Respondent's dispatchers would know with any certainty that a driver had been dropped to the bottom of the seniority list. As McFarlane's grievance statement illustrates, drivers could easily be ignorant of their loss of jobs. McFarlane only found out he had been displaced by a junior driver and filed a grievance because on that occasion he was second on the seniority list and he was alert enough to realize that he should have been called by 7 a.m. McFarlane followed up on his suspicions by calling the dispatcher and asking why he had not yet received a job assignment. Only then did McFarlane discover that he had been dropped to the bottom of the seniority list, after he allegedly had not responded to a 3 a.m. call. McFarlane states in his grievance that he had been home at 3 a.m. and that no call had come in, because, in his opinion, the dispatcher had dialed the wrong number. Senior drivers further down the list or drivers who were less alert than McFarlane might never realize that they had been dropped to the bottom of the seniority list.

The Respondent seeks to mount a managerial necessity defense, relying on *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1975). In that case the Board found that an employer's unilateral installation of a timeclock was lawful. The evidence in *Rust Craft* showed that some employees had been haphazard in manually recording their working time under the prior system and that the change to a timeclock was inconsequential for those employees who had conscientiously marked their timecards manually. The Board found that under the circumstances, the installation of the timeclock was a part of day-to-day managerial control which the employer was free to exercise. In the instant case, the change in the on-call procedures did not amount to an inconsequential difference in the application of the seniority system. Under the procedure announced on March 1, 1995, senior drivers who failed to respond to a first call would be dropped to the bottom of the seniority list for the day and when additional jobs were called in, the work would go to more junior drivers. The record reflects that senior drivers lost a number of paid hours of work as a result of the change in procedure. Moreover, the senior drivers who were dropped to the bot-

⁸ Sec. 10(b) provides, in relevant part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made."

⁹ The Respondent also maintains that the Board should defer to the joint area committee (JAC) decision dismissing the Union's grievance because the JAC level is equivalent to arbitration. The Respondent cites no authority to support its argument that the Board could properly defer to a joint panel determination on the same basis that it defers to arbitration proceedings. However, even assuming, arguendo, that Respondent's initial premise is valid, deferral is not appropriate in this case. The record is clear that the grievance over the change in the on-call procedure was denied on procedural grounds alone. The Board will not defer to an arbitration decision where there has been no ruling on the merits of the unfair labor practice issues. *Raytheon Co.*, 140 NLRB 883 (1963); and *Spielberg Mfg. Co.*, 112 NLRB 1980 (1955).

The Respondent's related argument that the Board should adopt the date chosen by the JAC as the date when the 10(b) statute of limitations began to run is without merit. The time established by the JAC as the date upon which the grievance limitation period commenced is irrelevant to the issue of the calculation of the 10(b) period, which is governed by established Board precedents.

tom of the list were not necessarily offenders who had deliberately ignored a dispatcher's call. As McFarlane's grievance illustrates, errors by the dispatchers could also account for the apparent failure in driver response.¹⁰

CONCLUSIONS OF LAW

1. The Respondent, United Parcel Service, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 243, International Brotherhood of Teamsters, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (5) of the Act by making a unilateral change in the on-call procedure for ALO drivers without affording the Union prior notice or an opportunity to bargain.

4. The above-cited unfair labor practice affects commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in the unfair labor practice described above, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

Respondent, having unilaterally changed the on-call procedure for ALO drivers commencing March 6, 1995, shall reinstate the procedure that was in place on March 1, 1995, and make whole any drivers for any losses suffered as a result of the unlawful change.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The Respondent, United Parcel Service, Livonia, Michigan, its officers, agents, successors, and assigns, shall

¹⁰UPS management apparently recognized the flaws in the unilaterally imposed change in the on-call procedure. In a memorandum to Ira Ozeran from Feeder Managers Brian Behan, Rich Leonard, and John Shanks dated July 18, 1995, the managers candidly admitted that the change in procedure only curbed the abuses "to some extent" and that "enforcement was inconsistent." The memorandum further states that the "problem with the top people not being available for early starts" ceased in May, after three drivers were issued disciplinary warnings for not responding to a call. According to the memorandum, therefore, it was the discipline issued to the offending drivers, rather than the change in procedure, that caused the most consistent improvement in responses by senior drivers. Offending drivers can be disciplined regardless of which on-call procedure is being utilized by UPS.

¹¹If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from making any change affecting the wages, hours, or other terms and conditions of employment of unit employees, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to the change, or in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately reinstitute the on-call procedure that was in place on March 1, 1995, whereby the most senior drivers are called first for each available job and are not dropped to the bottom of the seniority list for failure to respond.

(b) Make whole any ALO drivers for any wages and/or benefits they lost as a result of the unilateral change in the on-call procedure effective March 6, 1995, with interest.

(c) On request by the Union, bargain in good faith over the on-call procedure for ALO drivers.

(d) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, dispatcher logs, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Livonia, Michigan, copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 12, 1995.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

¹²If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."